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BABY GOT (A BROKEN) BACK, BUT NO REMEDY: THE SEVENTH CIRCUIT'S REFUSAL TO PROVIDE A REMEDY FOR EIGHTH AMENDMENT VIOLATIONS

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INTRODUCTION

In November 2006, William Miller was sentenced to ten years in prison for bank robbery.¹ Thirteen months later, he began to serve his sentence at the Federal Correctional Complex in Terre Haute, Indiana.² During the time between his sentencing and starting his sentence, Miller was diagnosed with a thalamic brain tumor that caused reduced sensation in the left side of his body.³ Because of this tumor, the prison's medical staff gave Miller a lower-bunk restriction because it was unsafe for him to be in an upper-bunk.⁴ Two years later, Miller was reassigned to a "special housing unit," where he was assigned to an upper-bunk despite repeatedly requesting a lower-bunk from the

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¹ Estate of Miller v. Marberry, 847 F.3d 425, 429 (7th Cir. 2017).

² *Id.*

³ *Id.* at 427.

⁴ *Id.*

prison guards and to the prison's warden.⁵ Miller fell from his assigned upper-bunk several times, and one of these falls fractured Miller's back.⁶ Miller brought a civil suit against Gary Rogers, a prison guard, and Helen Marberry, the Warden of the prison.⁷ Miller alleged that Rogers and Marberry acted with deliberate indifference to his serious medical condition in violation of his Eighth Amendment⁸ right to be free from cruel and unusual punishments.⁹

The district court construed his complaint as an action falling under the purview of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the 1971 United States Supreme Court case that first established a private cause of action for damages against federal officials for violating constitutional rights.¹⁰ The district court granted a motion for summary judgment in favor of Rogers and Marberry for two reasons: first, neither Rogers nor Marberry were responsible for bunk assignments; and, second, if Rogers had checked the prison's electronic database, he would not have found a lower-bunk restriction.¹¹ The United States Court of Appeals for the Seventh Circuit affirmed the lower court's decision, holding that Miller did not seek relief from the correct parties because neither of the defendants were responsible for bunk assignments or deciding who had a medical need for a lower-bunk.¹²

By affirming the lower court, the Seventh Circuit made several critical errors. First, the court ignored precedent establishing that deliberate indifference to a serious medical condition can violate the Eighth Amendment. Second, the court overextended the holding in *Ashcroft v. Iqbal*¹³ to absolve the defendants of liability. Third, the

⁵ *Id.* at 426.

⁶ *Id.*

⁷ *Id.*

⁸ U.S. CONST. amend. VIII

⁹ *Estate of Miller*, 847 F.3d at 431.

¹⁰ 403 U.S. 388 (1971).

¹¹ *Estate of Miller*, 847 F.3d at 427.

¹² *Id.* at 426.

¹³ *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009).

court ignored genuine disputes of material fact and improperly affirmed the lower court's grant of summary judgment to the defendants. The Seventh Circuit's holding in *Estate of Miller v. Marberry* will ultimately release federal officials from liability for violating constitutional rights and will limit the remedies for prisoners whose constitutional rights are violated.

A CAUSE OF ACTION FOR CONSTITUTIONAL VIOLATIONS

The 42nd Congress enacted 42 U.S.C. § 1983 which created a cause of action for damages under the Fourteenth Amendment against state officials for constitutional violations.¹⁴ However, 42 U.S.C. § 1983 did not provide for a cause of action against federal officials for constitutional violations. This meant that there was no remedy for individuals whose constitutional rights had been violated by a federal official. The United States Supreme Court took on the job of creating a private cause of action for individuals whose constitutional rights are violated by federal officials in a case called *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.¹⁵

A. Bivens v. Six Unknown Named Agents – Creating A Private Cause of Action Against Federal Officials

On November 26, 1965, six agents of the Federal Bureau of Narcotics entered the apartment of Webster Bivens without a search or arrest warrant.¹⁶ The agents searched the apartment from top to bottom.¹⁷ After the warrantless search of his apartment, Bivens was arrested for allegedly violating federal narcotics laws and was handcuffed and detained in front of his wife and children.¹⁸ Bivens

¹⁴ 42 U.S.C. § 1983 (West, Westlaw Next, through Pub.L. 104-317).

¹⁵ 403 U.S. 338 (1971).

¹⁶ *Bivens*, 403 U.S. at 389.

¹⁷ *Id.*

¹⁸ *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics (Bivens II)*, 409 F.2d 718, 719 (2d Cir. 1969).

was then taken to the Federal Narcotics Bureau where he was interrogated, photographed, fingerprinted, strip-searched, and booked.¹⁹ A United States Commissioner eventually dismissed Bivens' narcotics charges, but he still suffered "great humiliation, embarrassment, and mental suffering" because of the warrantless search and subsequent arrest.²⁰

After his release, Bivens sued the six federal agents in the United States District Court for the Eastern District of New York.²¹ He sought \$15,000 in damages from each of the six agents for violating his Fourth Amendment right to be free from unreasonable searches and seizures.²² The district court dismissed the complaint claiming the court lacked jurisdiction, or in the alternative, claiming that Bivens had failed to state a claim for which relief could be granted.²³

On appeal, the United States Court of Appeals for the Second Circuit held that the district court did have proper jurisdiction, but still affirmed the lower court's decision on the basis that Bivens's claim failed to state a cause of action.²⁴ The court hinged its decision on the fact that there was no established remedy for individuals whose rights had been violated by federal officials.²⁵ The court reasoned that policy decisions concerning the enforcement of a federal right should be left to Congress.²⁶ Thus, in the absence of an explicit congressional authorization for damages against federal officials, Bivens could not state a claim for which relief could be granted.²⁷ Under the Second Circuit's analysis, Bivens could only recover damages in an action between private citizens under state law.²⁸

¹⁹ *Id.*

²⁰ *Bivens*, 403 U.S. at 389.

²¹ *Bivens II*, 409 F.2d at 719.

²² *Id.* at 719.

²³ *Id.* at 719–20.

²⁴ *Bivens*, 403 U.S. at 390.

²⁵ *Bivens II*, 409 F.2d at 719.

²⁶ *Id.* at 726.

²⁷ *Id.*

²⁸ *Bivens*, 403 U.S. at 392.

The United States Supreme Court reversed the decision of the Second Circuit.²⁹ The Court emphasized the differences in a relationship between two private citizens and a relationship between a private citizen and a federal agent.³⁰ The Court reasoned that “[a]n agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.”³¹ Further, the Court pointed out that its “cases make clear the Fourth Amendment operates as a limitation upon the exercise of federal power” and “guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority.”³² The Court did not concern itself with the absence of an express authorization from Congress for damages as a remedy because “where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief,”³³ and “[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.”³⁴ This was the first time the Supreme Court recognized a private cause of action for damages against federal agents for constitutional violations.

Even though the Court approved money damages against federal agents as an appropriate remedy, the holding in *Bivens* was deliberately narrow.³⁵ The Court urged future courts to be wary of permitting an action for damages in the absence of Congressional approval unless there were no “special factors counselling hesitation.”³⁶ Moreover, the Court did not create a damages remedy for any and all constitutional violations. The Court specified that this

²⁹ *Id.* at 390.

³⁰ *Id.* at 391–92.

³¹ *Id.* at 392.

³² *Id.*

³³ *Id.* (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

³⁴ *Id.* at 395.

³⁵ *Id.* at 396.

³⁶ *Id.*

remedy was reserved specifically for violations of the Fourth Amendment.³⁷

B. The Evolution of Bivens

Bivens established that when federal officials violate the Fourth Amendment, money damages are an appropriate and acceptable remedy.³⁸ However, *Bivens* gave no guidance on what to do for constitutional violations outside of the Fourth Amendment. Since 1971, the Court has reexamined the *Bivens* action several times.

1. Expanding *Bivens*.

In *Bivens*, the Supreme Court specified that its holding extended only to violations of the Fourth Amendment. However, there are many other ways to violate an individual's constitutional rights. It was inevitable that once the Court opened the door for lawsuits against federal officials for violating an individual's Fourth Amendment rights, litigants would begin to bring lawsuits when federal officials violated other constitutional rights as well.

a. Davis v. Passman – The Fifth Amendment

Eight years after *Bivens* was decided, the Supreme Court reconsidered the scope of the *Bivens* action for the first time.³⁹ In *Davis v. Passman*⁴⁰ the Court confronted the issue of whether a cause of action and a damages remedy could be implied under the Constitution when the Fifth Amendment's Due Process Clause is

³⁷ *Id.*

³⁸ *Id.*

³⁹ The Supreme Court addressed the *Bivens* issue in several cases during these eight years, but none of these decisions impacted the scope of *Bivens*. *See, e.g.*, *Butz v. Economou*, 437 U.S. 478 (1978) (addressing whether qualified immunity trumps a *Bivens* action).

⁴⁰ *Davis v. Passman* (Davis I), 442 U.S. 228 (1979).

violated.⁴¹ The Court of Appeals for the Fifth Circuit, sitting en banc, determined that “no civil action for damages” could be implied.⁴² However, the Supreme Court disagreed.⁴³

The plaintiff in *Davis* was a female employed as a deputy administrative assistant for a United States Congressman. About six months after the plaintiff began working for the congressman, the congressman terminated her employment.⁴⁴ The congressman wrote her a note that said she was “able, energetic and a very hard worker,” but he had decided “that it was essential that the understudy to [his] Administrative Assistant be a man.”⁴⁵

The plaintiff alleged that her boss discriminated against her “on the basis of sex in violation of the United States Constitution and the Fifth Amendment thereto.”⁴⁶ The plaintiff sought damages in the form of back pay,⁴⁷ and reinstatement to her position with a promotion and salary increase.⁴⁸ However, the matter was complicated by two things. First, the congressman argued that he was immune from liability for damages under the doctrine of qualified immunity.⁴⁹ And second, the congressman had lost his re-election and was no longer in office.⁵⁰ Therefore, there was no longer the possibility of relief by reinstate, promotion, and a salary increase.⁵¹

The district court dismissed the suit for failure to state a claim on which relief could be granted because “the law afford[ed] no private right of action” for her claim.⁵² A panel of the Court of Appeals for the

⁴¹ *Id.* at 229.

⁴² *Davis v. Passman* (*Davis II*), 571 F.2d 793, 801 (5th Cir. 1978) (en banc).

⁴³ *Davis I*, at 229.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 230–31

⁴⁷ *Id.* at 231.

⁴⁸ *Id.* n.4.

⁴⁹ *Id.* at 231 n.5.

⁵⁰ *Id.* at 230 n.1, 245.

⁵¹ *Id.* at 245.

⁵² *Id.* at 230.

Fifth Circuit reversed the district court, but the panel's decision was reversed by an en banc decision of the Fifth Circuit.⁵³

The Supreme Court reversed the Fifth Circuit's en banc decision for four reasons. First, damages were the appropriate remedy in this case: the plaintiff could not be reinstated at her job because the congressman was no longer in office and no longer had a congressional staff. Because "it [was] damages or nothing" for the plaintiff, the Court held that damages were appropriate.⁵⁴ Second, even though allowing a lawsuit against a congressman for actions taken in the course of his official conduct raised special concerns counseling hesitation, the concerns were alleviated by the protections afforded to congressmen by the Speech and Debate Clause.⁵⁵ Because the congressman's actions were not shielded by the Speech and Debate Clause, the Court applied the principle that "legislators ought . . . generally be bound by [the law] as are ordinary persons."⁵⁶ Third, there had been "no explicit congressional declaration that persons' in petitioner's position injured by unconstitutional federal employment discrimination 'may not recover money damages from' those responsible for the injury."⁵⁷ Finally, the Court was not concerned with flooding federal courts with claims because a similar remedy was already available for similar injuries when they occurred under state law by virtue of 42 U.S.C. § 1983.⁵⁸ The Court concluded that the petitioner had a cause of action under the Fifth Amendment, and the appropriate remedy would be damages if the petitioner prevailed on the merits of her case.⁵⁹

⁵³ *Id.*

⁵⁴ *Id.* at 246 (quoting *Bivens*, 403 U.S. at 410).

⁵⁵ *Id.* at 236.

⁵⁶ *Id.*

⁵⁷ *Davis I*, 442 U.S. at 246–47 (quoting *Bivens*, 403 U.S. at 397).

⁵⁸ *Id.* at 248.

⁵⁹ *Id.* at 248–49.

b. Carlson v. Green – The Eighth Amendment

In 1980, the Supreme Court considered expanding *Bivens* once again, this time for a violation of Eighth Amendment rights. The action was brought by a mother on behalf of her deceased son. She alleged that her son was injured and died because federal prison officials violated his equal protection, due process, and Eighth Amendment rights.⁶⁰

The Court reiterated that *Bivens* established damages as the appropriate remedy when federal officials violate an individual's constitutional rights.⁶¹ The Court gave two specific situations in which *Bivens* actions for constitutional violations may be defeated. First, if the defendants demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress."⁶² Or second, if the defendants show Congress has provided an equally effective alternative remedy and has explicitly declared it to be a substitute for recovery under the Constitution.⁶³

The Court found no "special factors counseling hesitation" because the prison officials were not exempt from judicially created remedies, and they were adequately protected by the qualified immunity afforded to them under *Butz v. Economou*,⁶⁴ which states, "Federal officials will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law."⁶⁵

Similarly, there was no congressional declaration substituting another form of recovery for violations of the Eighth Amendment.⁶⁶ The prison officials argued that the Federal Tort Claims Act (FTCA) acted as the necessary substitution, but the Court disagreed. The Court pointed to congressional commentary to support its assertion that

⁶⁰ *Carlson v. Green*, 446 U.S. 14, 18 (1980).

⁶¹ *Id.* at 19.

⁶² *Id.* (quoting *Bivens*, 403 U.S. at 396).

⁶³ *Id.* at 18–19.

⁶⁴ 438 U.S. 478 (1978).

⁶⁵ *Id.* at 507.

⁶⁶ *Id.*

FTCA was not meant to be a substitute for a *Bivens* action, but was a parallel and complementary cause of action.⁶⁷

The Court pointed to four additional factors that suggested *Bivens* was an effective remedy for violations of the Eighth Amendment, and to support its conclusion that Congress did not intend for FTCA to be an exclusive substitute remedy. First, the *Bivens* remedy would compensate the victim and act as a deterrent because it is recoverable against individuals.⁶⁸ Second, the Court's previous decisions indicated that punitive damages could be awarded in a *Bivens* suit.⁶⁹ Punitive damages were particularly appropriate where they would be available in a comparable 42 U.S.C. § 1983 action against a state official, and the “‘constitutional design’ would be stood on its head if federal officials did not face at least the same liability as state officials guilty of the same constitutional transgression.”⁷⁰ Third, there is the option for a jury in a *Bivens* action.⁷¹ Fourth, the liability of federal officials who violate citizens' constitutional rights should be subject to uniform rules.⁷² The Court held that in the absence of an explicit congressional mandate, the FTCA was an exclusive remedy, and the FTCA did not sufficiently protect citizens' rights.⁷³

Ultimately, the Court extended a private cause of action under *Bivens* against federal officials who violate a person's Eighth Amendment Constitutional rights.

2. Refining *Bivens*

After *Bivens*, *Davis*, and *Carlson*, federal courts recognized non-statutory causes of action against federal officials for violating an individual's Fourth, Fifth, or Eighth Amendment rights. If a plaintiff

⁶⁷ *Id.*

⁶⁸ *Id.* at 21.

⁶⁹ *Id.* at 22.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 23.

⁷³ *Id.*

could show that there were no special factors counseling hesitation, and that Congress had not expressly declared a new cause of action as an equally remedial substitute for *Bivens*, a *Bivens* action was appropriate.

The Court then veered from its pattern of expanding *Bivens*, and began to refine the cause of action until it developed into what it is today. After *Carlson*, the Court examined who could be a proper defendant in a *Bivens* action, and when a *Bivens* action was unavailable.

a. Bush v. Lucas – The First Amendment

In 1983, the Supreme Court once again considered expanding the scope of *Bivens*. This time, the Court was asked to authorize a non-statutory damages remedy under *Bivens* for a federal employee whose First Amendment rights were violated by his superiors.⁷⁴ The petitioner was an aerospace engineer employed at a facility run by the National Aeronautics and Space Administration.⁷⁵ The facility where the petitioner worked underwent a series of reorganizations, which caused him to be reassigned to new positions twice.⁷⁶ He appealed both reassignments, and, while the appeals were pending, he gave two public interviews and made several public comments condemning the facility for fraudulent and wasteful use of taxpayers' money.⁷⁷

The respondent, the director of the facility, commenced an adverse personnel action charging the petitioner with publicly making misleading and false statements that demonstrated a malicious attitude towards management and all personnel of the facility, thus stunting efficiency and negatively affecting public confidence in the government and its services.⁷⁸ The respondent determined that although the petitioner's conduct could justify termination, demotion

⁷⁴ *Bush v. Lucas*, 462 U.S. 367, 368 (1983).

⁷⁵ *Id.* at 369.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 369–70.

was the appropriate consequence for a first offense.⁷⁹ The petitioner appealed to the Federal Employee Appeals Authority, and the Authority concluded that the demotion was justified.⁸⁰

Two years later, the Civil Service Commission's Appeals Review board reopened the petitioner's proceedings and recommended that he be restored to his former position with backpay because his statements were not "wholly without truth" and did not "justify abrogation of the exercise of free speech."⁸¹ While this appeal was pending, the petitioner filed an action against the respondent seeking to recover damages for defamation and violation of his First Amendment free speech rights.⁸² The district court granted the respondent's motion for summary judgment and the Fifth Circuit affirmed, holding the "plaintiff had no cause of action for damages under the First Amendment for retaliatory demotion in view of the available remedies under the Civil Service Commission Regulations."⁸³

The Supreme Court affirmed the Fifth Circuit and declined to expand the *Bivens* action to this new scenario.⁸⁴ The Court pointed to Congress' step by step development of the Civil Service Commission Regulations and its elaborate remedial system as a reason not to create a new judicial remedy.⁸⁵ Similarly, subjecting management personnel to personal liability for employment decisions they believed to be a proper response to improper criticism of an agency would deter management from imposing necessary discipline in future cases.⁸⁶ Finally, the Court pointed to Congress' ability to accurately assess the need for a new remedy and to create a statutory remedy as a reason not to create a judicial remedy.⁸⁷

⁷⁹ *Id.* at 370.

⁸⁰ *Id.*

⁸¹ *Id.* at 372.

⁸² *Id.* at 372.

⁸³ *Bush v. Lucas* (Bush II), 647 F.2d 573, 574 (4th Cir. 1981).

⁸⁴ *Bush*, 462 U.S. at 390.

⁸⁵ *Id.* at 388.

⁸⁶ *Id.* at 389.

⁸⁷ *Id.*

b. FDIC v. Meyer – Agents, Not Agencies

In 1994, the Supreme Court was asked to extend a cause of action under *Bivens* against an agency of the Federal Government.⁸⁸ *FDIC v. Meyer*⁸⁹ involved a man who sued the Federal Savings and Loan Insurance Corporation for depriving him of a property interest without due process of law in violation of the Fifth Amendment.⁹⁰

The Court refused to extend a *Bivens* action against a federal agency for two reasons. First, creating a direct cause of action for damages against federal agencies could potentially subject the Federal Government to enormous financial burdens.⁹¹ Second, the Court was concerned that if claimants were permitted to bring an action directly against a federal agency, the aggrieved party would have no reason to bring an action for damages against the individual officers who caused the harm.⁹² This would effectively eliminate the deterrent effects that the *Bivens* action was intended to promote.⁹³ Because the purpose of the *Bivens* action is to deter federal officials from violating constitutional rights, the *Bivens* action is only appropriate against federal officials, not against federal agencies.⁹⁴

ESTATE OF MILLER V. MARBERRY

For reasons not identified within the record, William Miller died before his appeal reached the Seventh Circuit.⁹⁵ His estate was

⁸⁸ See *FDIC v. Meyer*, 510 U.S. 471 (1994).

⁸⁹ *Id.*

⁹⁰ *Id.* at 474.

⁹¹ *Id.* at 486.

⁹² *Id.* at 485.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Estate of Miller*, 847 F.3d at 426.

substituted as the plaintiff in the case.⁹⁶ I will identify the plaintiff by Miller's name for clarity and expediency.

A. Facts of the Case

The facts presented in the majority opinion are slightly different from the facts presented by Judge Posner in his dissenting opinion. This statement of facts will attempt to consolidate the facts from both opinions.

In November 2006, William Miller was convicted of bank robbery and was sentenced to ten years in prison.⁹⁷ Sometime after his sentencing and before he began serving his sentence, Miller was diagnosed with a thalamic brain tumor.⁹⁸

After being diagnosed with the brain tumor, Miller began serving his sentence in the Federal Correctional Complex in Terre Haute, Indiana ("FCC Terre Haute").⁹⁹ One month after arriving at FCC Terre Haute, Miller's doctor ordered that he be restricted to a lower-bunk because of his thalamic brain tumor.¹⁰⁰ The tumor caused Miller to have impaired feeling in the left side of his body, and his doctor thought that a lower-bunk restriction was necessary to ensure his safety as a prisoner.¹⁰¹ The lower-bunk restriction was supposed to be entered into the prison's computer database system called SENTRY.¹⁰²

About a year later, Miller was moved from the prison's general population to a more restrictive housing unit called the "Special Housing Unit."¹⁰³ When Miller was first moved to the "Special Housing Unit," he was assigned to a lower-bunk in accordance with

⁹⁶ *Id.*

⁹⁷ *Id.* at 429.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 430.

¹⁰² *Id.* at 426.

¹⁰³ *Id.* at 429.

his medical restriction.¹⁰⁴ However, before he was able to spend even one night in his assigned lower-bunk, he was reassigned to an upper-bunk.¹⁰⁵ Miller told Gary Rogers, the head guard in his new housing unit, that he had a lower-bunk restriction because of his brain tumor.¹⁰⁶ Rogers told Miller that he would not be reassigned to a lower-bunk, and that if he refused to sleep in his assigned upper-bunk he would “receive a disciplinary report for refusing a direct order.”¹⁰⁷

Five days after Rogers denied Miller’s initial plea for a lower-bunk, Miller became dizzy while climbing down the ladder from his upper-bunk, slipped, and fell.¹⁰⁸ Miller hit his head on the concrete floor and lost consciousness.¹⁰⁹ Miller was taken to a hospital, treated for his injuries, and given a CAT scan.¹¹⁰ When Miller returned to the prison, he was again assigned to an upper-bunk.¹¹¹ Miller once again told Rogers about his lower-bunk restriction, and Rogers once again did nothing.¹¹²

Around this same time, Helen Marberry, the prison’s warden, had an encounter with Miller during one of her weekly walks through the special housing unit.¹¹³ Miller told Marberry about his fall and his subsequent trip to the hospital. He then informed Marberry that he had improperly been assigned to an upper-bunk, and he asked for her help to get him a corrected bunk assignment.¹¹⁴ Marberry would not even listen to Miller.¹¹⁵ According to Miller’s complaint, Marberry “walked

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 430.

¹¹⁴ *Id.* at 429.

¹¹⁵ *Id.*

away from [Miller's] cell door leaving him midspeech.”¹¹⁶ Marberry ignored Miller's plea for a bunk reassignment “despite the fact that before he entered the Special Housing Unit, Miller had repeatedly discussed his brain tumor with [Marberry] on her visits to prisoners during their lunch period.”¹¹⁷

In February of 2009, less than six weeks after his first fall, Miller once again fell from his upper-bunk, this time in the middle of the night.¹¹⁸ Miller severely compacted a segment of his cervical spine and fractured his thoracic spine.¹¹⁹ Miller, with a broken back, remained lying on the floor for over an hour before any member of the prison staff noticed that he was injured.¹²⁰ Miller was taken to the emergency room of a nearby hospital and placed in a hard clamshell brace.¹²¹

When Miller returned to the prison from the hospital, he again asked for a lower-bunk assignment, and his request was again denied with no reason given.¹²² Warden Marberry continued to have weekly walks through the “Special Housing Unit,” and each time she approached Miller's cell, she would see him on his assigned upper-bunk wearing his clamshell back brace and a cervical neck brace.¹²³ Every time she approached Miller's cell, he asked her to be re-assigned to a lower-bunk, but his requests went ignored.¹²⁴ The head guard, Rogers, also frequently saw Miller wearing multiple body braces while sitting on his upper-bunk.¹²⁵ Rogers did nothing in response to Miller's frequent requests that his lower-bunk restriction

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 430.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

be honored.¹²⁶ Throughout this entire period of time, Miller was in acute pain from his severe back injuries.¹²⁷

Finally, ten months after Miller fractured his back, he was given a new lower-bunk restriction.¹²⁸ However, Miller was not immediately reassigned to a lower-bunk.¹²⁹ Eleven days after the new restriction was given, but before Miller had actually been assigned to a lower-bunk, a wound on Miller's back that had been stapled burst open, "discharging a large amount of a yellowish fluid consisting mainly of blood."¹³⁰ Miller was taken to a hospital and remained there for four months until the wound had finally healed.¹³¹ After returning to the prison from his four month stay in the hospital, Miller was at last given a lower-bunk.¹³²

Miller filed an administrative complaint with the prison, but his complaint was denied on the grounds that "although he'd had a lower-bunk restriction since January 29, 2008 –he had never submitted a document confirming that restriction to a member of the prison's staff, as required by a notice to the prisoners that 'It is your responsibility to have all medical restrictions on your person to present to staff.'"¹³³ Unfortunately for Miller, even though he had been given a lower-bunk restriction, he had lost the document confirming this restriction, and he was unable to obtain a new copy.¹³⁴

Miller's complaints culminated in a remarkable brush-off from the Federal Bureau of Prisons Office of Regional Counsel stating: "investigation of your claim did not reveal you suffered any personal

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

injury as a result of the negligent acts or omissions of Bureau of Prisons employees acting within the scope of their employment.”¹³⁵

Miller then filed a claim in The United States District Court for the Southern District of Indiana alleging that Marberry and Rogers violated his Eighth Amendment rights.¹³⁶ The district court granted the Defendants’ motion for summary judgment on the reasoning that neither Marberry nor Rogers were in charge of bunk assignments.¹³⁷ Further, the court stated that Miller had “not identified a genuine issue of material fact as to his claim against any of the defendants.”¹³⁸

B. The Seventh Circuit Majority Opinion

In a split panel decision, the Seventh Circuit affirmed the decision of the district court.¹³⁹ Judge Easterbrook and Judge Sykes voted to affirm the lower court, while Judge Posner voted to reverse the lower court.¹⁴⁰

The majority made several critical errors by affirming the decision of the district court. First, the majority ignored precedent establishing that a prison official’s deliberate indifference to a serious medical condition can violate the Eighth Amendment. Second, the majority overextended the holding in *Ashcroft v. Iqbal*¹⁴¹ to absolve the defendants of liability for their inaction. Third, the majority ignored genuine disputes of material fact and improperly affirmed the district court’s grant of summary judgment to the defendants.

¹³⁵ *Id.*

¹³⁶ Miller v. Marberry, 2015 U.S. Dist. LEXIS 10946, at *2 (S.D. Ind. 2015).

¹³⁷ *Id.* at 11–15.

¹³⁸ *Id.* at 16.

¹³⁹ *Estate of Miller*, 847 F.3d at 426.

¹⁴⁰ *Id.* at 425.

¹⁴¹ 556 U.S. 662 (2009).

1. The Eighth Amendment Violation

In the eyes of the majority, “Miller’s principal problem [was] the identity of the two defendants.”¹⁴² The majority believed that Miller should have sued either the guard responsible for making the bunk assignments, or the person in the prison’s medical department responsible for deciding who has a medical need for a lower-bunk.¹⁴³ The majority minimized Miller’s claim by focusing only on the lower-bunk restriction and its enforcement, without considering the actions, or inaction, of Rogers and Marberry. The majority pointed out that “the Supreme Court has never held that *Bivens* actions can be used to enforce administrative orders,” nor has it “held that every public official has a duty to carry out every other public official’s decision.”¹⁴⁴ The majority then analogized Miller’s case to *Town of Castle Rock v. Gonzales*,¹⁴⁵ which held that neither prosecutors nor police officers are liable for failure to enforce a judicial no-contact order,¹⁴⁶ and questioned why Miller’s lower-bunk restriction should receive greater status than a judicial no-contact order.¹⁴⁷ Unfortunately for Miller, this was a gross mischaracterization of his claim.

The majority stated that for Miller to get anywhere with his claim, he had to establish that Rogers and Marberry violated his constitutional rights, which Miller did not do.¹⁴⁸ For Miller to succeed with a medical claim under the Eighth Amendment, he needed to establish the defendants knew of, or were deliberately indifferent to, Miller’s serious medical condition and did not take minimally competent steps to deal with that condition.¹⁴⁹ According to the majority, there was no way that Rogers or Marberry could have known

¹⁴² *Id.* at 426.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 427.

¹⁴⁵ 545 U.S. 748 (2005).

¹⁴⁶ *Id.* at 768.

¹⁴⁷ *Estate of Miller*, 847 F.3d at 427.

¹⁴⁸ *Id.* at 428.

¹⁴⁹ *Id.*

about Miller's serious medical condition.¹⁵⁰ The majority believed that Miller's statements to Rogers and Marberry about his brain tumor fell short of demonstrating a serious medical condition because there are many types of brain tumors that have a range of effects, and "benign tumors can last decades without causing adverse consequences."¹⁵¹ It is true that not all brain tumors constitute a serious medical condition, but Miller's brain tumor actually caused symptoms that made it a serious medical condition. The majority seems to overlook that the Seventh Circuit acknowledged in *Edwards v. Snyder*¹⁵² that a broad variety of medical conditions can amount to a serious medical need, "including a dislocated finger, a hernia, arthritis, heartburn and vomiting, a broken wrist, [or] minor burns from lying in vomit."¹⁵³ Surely a brain tumor that causes numbness on one half of the body is at least as serious heartburn, vomiting, or a minor burn.

Further, the majority stated that Rogers and Marberry were "not obliged to believe Miller's assertion that he had a brain tumor and a lower-bunk pass" because prisoners often use manipulation and deceit to obtain advantages in prison.¹⁵⁴ Even if Rogers and Marberry did not believe that Miller had a serious medical condition after his first few pleas for a lower-bunk, it seems unreasonable that they would still believe he was trying to manipulate them after his first fall from the upper-bunk. Could they reasonably believe that he was attempting to manipulate them after his second fall fractured his spine? A major problem with the majority's opinion is that each fact from the case seems to have been examined in a vacuum. Each instance of Rogers or Marberry ignoring Miller's pleas may not individually amount to a violation of the Eighth Amendment, but looking at the facts of the case as a whole established that Miller's Eighth Amendment rights were violated.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 428.

¹⁵² 478 F.3d 827 (7th Cir. 2007).

¹⁵³ *Id.* at 831.

¹⁵⁴ *Id.* at 428.

At the very least, Rogers and Marberry were deliberately indifferent to Miller's serious medical condition. Deliberate indifference occurs when a prison official "realizes that a substantial risk of serious harm to a prisoner exists, but disregards it."¹⁵⁵ Deliberate indifference can be found where a prison official knows about a constitutional violation and "turns a blind eye" to it.¹⁵⁶ Rogers and Marberry both turned a blind eye to Miller's substantial risk of serious harm by repeatedly ignoring his pleas.

Because Rogers and Marberry knew about, or were deliberately indifferent to, Miller's serious medical condition, Miller would have succeeded on an Eighth Amendment claim if he could have proved that they did not take minimally competent steps to deal with his condition.¹⁵⁷ Neither Rogers nor Marberry took the minimally competent steps to assist Miller with his condition. In fact, neither of them took any steps to help him at all. The majority repeatedly brings up the fact that Miller should have complained to the guard who sat in an isolated pod and was responsible for bunk-assigning duties. Unfortunately, Miller only complained to Rogers and Marberry, who apparently were not capable of verifying Miller's complaints or fixing the problem.¹⁵⁸ But, would it have been that difficult for Rogers, who regularly roamed the halls of the prison, to ask the guard in the pod if Miller was telling the truth? Did Marberry, the warden of the prison, really not have the ability to verify if Miller was telling the truth? At the very least, Rogers or Marberry could have informed Miller of the proper person to bring his complaint to. Instead, Rogers and Marberry did nothing. They ignored Miller time after time. Rogers and Marberry did not have to fix the problem in its entirety; they only had to take minimally competent steps to fix the problem, which they failed to do. Rogers and Marberry both violated Miller's Eighth Amendment rights when they acted with deliberate indifference to Miller's serious

¹⁵⁵ *Perez v. Fenoglio*, 792 F.3d 768, 781 (7th Cir. 2015).

¹⁵⁶ *Id.*

¹⁵⁷ *Estate of Miller*, 847 F.3d at 428.

¹⁵⁸ *Id.*

medical condition and failed to take the minimally competent steps to deal with that condition.

2. The Majority Overextended *Ashcroft v. Iqbal*'s Holding

Next, the majority pointed to *Ashcroft v. Iqbal*¹⁵⁹ to relieve Rogers and Marberry from liability because “liability under *Bivens* is personal rather than vicarious.”¹⁶⁰ It is true that vicarious liability is inapplicable to *Bivens*,¹⁶¹ but the majority overextended the holding in *Iqbal* to absolve Rogers and Marberry of liability. In *Iqbal*, the Supreme Court rejected the proposition that a supervisor’s mere knowledge of a subordinate’s intent to discriminate amounts to the supervisor violating the Constitution.¹⁶² The Court in *Iqbal* made it clear that federal officials with supervisory authority “may not be held accountable for the misdeeds of their agents,” and that “purpose rather than knowledge is required to impose . . . liability . . . [on] an official charged with violations arising from his or her superintendent responsibilities.”¹⁶³ In *Miller*, the majority failed to recognize that knowledge can impact an official’s duty: “A prison official’s knowledge of prison conditions learned from an inmate’s communications can, under some circumstances, constitute sufficient knowledge of the conditions to require the officer to exercise his or her authority and to take the needed action to investigate and, if necessary, to rectify the offending condition.”¹⁶⁴ The majority failed to recognize that Marberry was not named as a defendant because her subordinate failed to assign Miller to the proper bunk; she was named as a defendant because she had sufficient knowledge of Miller’s condition to require her to exercise her authority and take some form of action.

¹⁵⁹ 556 U.S. 662 (2009).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 676.

¹⁶² *Id.* at 677.

¹⁶³ *Id.*

¹⁶⁴ *Vance v. Peters*, 97 F.3d 987, 993 (7th Cir. 1996).

In an attempt to bolster its theory of vicarious liability, the majority analogized Miller's case to *Burks v. Raemisch*,¹⁶⁵ where the Seventh Circuit held that prison officials do not become liable for rejecting prisoner's grievances merely because the official fails to ensure an adequate remedy.¹⁶⁶ However, in *Burks*, the prisoner brought a lawsuit against every prison official who knew or should have known about his medical condition, and also everyone higher up in the prison's bureaucratic chain.¹⁶⁷ The prisoner in *Burks* had named defendants that he had never even come into contact with.¹⁶⁸ Miller's case was different because he only named defendants who he had actually had contact with and were somehow involved in his plight.

The majority stated that Miller's argument was deficient because it "suppose[d] that every federal employee is responsible, on pain of damages, for not implementing the decision of any other federal employee,"¹⁶⁹ but this is not true. Miller was not seeking damages because a federal official did not implement the decision of another federal employee; Miller was seeking damages because Rogers and Marberry did absolutely nothing to assist him with his repeated requests to be placed in bed that was safe for him. As the court stated in *Burks*: "Doing nothing *could* be simple negligence, but it does not stretch the imagination to see that it might also amount to deliberate indifference."¹⁷⁰ Ultimately, the majority rested its decision on the assertion that failing to enforce another federal official's decision cannot amount to an Eighth Amendment violation, and ignored the defendants' inaction.

¹⁶⁵ 555 F.3d 592 (7th Cir. 2009).

¹⁶⁶ *Id.* at 596.

¹⁶⁷ *Id.* at 594.

¹⁶⁸ *Id.* at 593.

¹⁶⁹ *Estate of Miller*, 847 F.3d at 427.

¹⁷⁰ *Burks*, 555 F.3d at 594.

3. Summary Judgment in Favor of the Defendants was Improper

Lastly, the district court's grant of summary judgment in favor of the defendants should not have been affirmed. Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."¹⁷¹ A factual dispute is "material" if it might affect the outcome of the case.¹⁷² A material factual dispute is "genuine" if "a reasonable jury could return a verdict for the nonmoving party."¹⁷³ Lastly, on a motion for summary judgment, the facts must be presented in the light most favorable to the non-moving party.¹⁷⁴ When the facts are presented in the light most favorable to Miller, there are genuine disputes of material fact that would not entitle the defendants to judgment as a matter of law.

The district court granted summary judgment to the Defendants for two reasons. First, neither Rogers nor Marberry were responsible for bunk assignments.¹⁷⁵ Second, if Rogers had consulted the prison's SENTRY database, he would not have found a lower-bunk restriction in the database.¹⁷⁶ The district court found it uncontested that Miller's first lower-bunk restriction was not in the SENTRY database, and a new restriction was not issued until December 1, 2009.¹⁷⁷ The district court relied on affidavits filed by Rogers and other guards stating that in January and February of 2009, Miller's lower-bunk restriction was not recorded in the SENTRY database.¹⁷⁸ However, this was directly contradicted by Warden Marberry, who confirmed in writing that Miller had received a lower-bunk restriction in January 2008, and the

¹⁷¹ FED. R. CIV. P. 56(a).

¹⁷² *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Estate of Miller*, 847 F.3d at 427.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 427.

restriction was recorded in the SENTRY database.¹⁷⁹ This inconsistency was sufficient to create a genuine dispute of material fact that should have precluded summary judgment. This factual dispute is material because it might have affected the outcome of the case. Similarly, the dispute was genuine because a jury could have returned a verdict in favor of Miller. If there was a lower-bunk restriction recorded in the SENTRY database, and Rogers had completely ignored it, a jury could reasonably find that Rogers had violated Miller's Eighth Amendment rights.

CONCLUSION

The Seventh Circuit made several critical errors when it affirmed the decision of the lower court in *Estate of Miller v. Marberry*. The majority opinion ignored binding precedent, overextended the holdings of cited cases, and affirmed a grant of summary judgment when there were genuine disputes of material fact. In doing so, the Seventh Circuit has told prison officials that it is acceptable to ignore prisoners. The Seventh Circuit has told federal inmates that they have no remedy for harm caused to them by a federal official's inaction and apathy. The United States Supreme Court has stated that the purpose of the *Bivens* action is to deter federal officials from violating constitutional rights, but the Seventh Circuit's opinion in *Estate of Miller v. Marberry* deviates from the desired purpose.

¹⁷⁹ *Id.* at 431 (Posner, J., dissenting).